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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BY HAND


Magalie Roman Salas
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Suite TW-A325
Washington, D.C. 20554

Re: CC Docket Nos. 96-98/96-262
Written Ex Parte Presentation

Dear Ms. Salas:

The enclosed document is a point-by-point response to assertions made by SBC Communications that the Commission should not adopt a Notice of Proposed Rulemaking concerning special access performance metrics.

Pursuant to section 1.1206(b)(1) of the Commission's rules, 47 C.F.R. § 1.1206(b)(1), an original and one copy of this letter and enclosure are being provided to you for inclusion in the public record of the above-referenced proceeding.

Sincerely,

Lisa B. Smith

cc: Cathy Carpino
Jonathan Reel
Michelle Carey
Kathy Farroba
Renee Crittendon
Uzoma Onyeije
Ben Childers

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**Response of WorldCom, Inc. to
August 16, 2001 *Ex Parte* Presentation of SBC Communications, Inc.**

Performance measures are inconsistent with the Commission's determination in the *UNE Remand Order* that it may not consider the availability of special access circuits in applying section 251(d)(2).

The Commission has plenary authority under sections 201 and 202 of the Communications Act of 1934, as amended ("Act") to ensure that carriers provide interstate access services under just, reasonable and non-discriminatory terms and conditions. Performance measures are one method of achieving that statutory mandate.

The special access market is highly competitive.

This sweeping statement substantially overstates the state of competition for special access services. Even in the largest markets, most routes continue to be served exclusively by incumbent LECs. Competitive LECs remain particularly dependent on special access services offered by incumbent LECs for DS1 channel terminations that link end users to central offices ("last mile connections").

WorldCom's own experience reflects this continued dependence on incumbent LECs for special access services that competitive LECs need to compete with the incumbents in the downstream retail markets. For example, in the states where SBC's incumbent LECs operate, the availability of competitive access providers (CAPs)¹ or on-net facilities as an alternative to the incumbent LEC is limited to 8% of the last mile market. This is measured by the number of unique on-net buildings or CAP-served buildings currently available to WorldCom, compared to the number of building addresses for which WorldCom has obtained special access services from the incumbent LEC, and was billed, as of May 2001, for special access by SBC.

Moreover, WorldCom's operating policy is to use its own dedicated facilities or facilities or services obtained from other competitive LECs for dedicated access whenever possible. While WorldCom makes every effort to obtain circuits from alternative providers, bear in mind, the number of CAPs that actually own channel termination facilities into buildings represents a fraction of the total number of CAPs.² Many of these providers are still dependent upon the ILEC for channel termination facilities. For this

¹ WorldCom has agreements with over 40 competitive access providers and competitive local exchange carriers for special access alternatives to the incumbent LECs.

² The New York Department of Public Service recently stated, "Verizon supplied other data on the number of buildings served by competitors in New York City, which show a maximum of 900 buildings served by individual competitors' fiber facilities...[A]ccording to the New York City Department of Planning, there are 775,000 buildings in the entire city, over 220,000 of which are mixed use, commercial, industrial, or public institutions." See Opinion and Order Modifying Special Service Guidelines for Verizon New York Inc., Confirming Tariff, and Requiring Additional Performance Reporting, Case Nos. 00-C-2051, 92-C-0665, slip op. at 7 and 8. (June 15, 2001)

reason, between August 1, 2001 and August 31, 2001, nearly 90% of WorldCom special access circuits were ordered from incumbent LECs, nationally.

349 carriers provide special access service (compared with 109 at time of *UNE Remand Order*)

As explained in WorldCom's Reply Comments in CC Docket No. 96-98 (filed on April 30, 2001), the 349 carriers alleged by SBC exaggerates the number of carriers providing facilities-based special access service. The estimate is based on FCC carrier locator data that represent the number of carriers reporting to the Commission that they provide competitive access service. But, many of the 349 competitive LECs included in the FCC data provide only switched access service. In addition, the absolute number of carriers providing special access service says nothing about whether a competitive alternative to an incumbent LEC is actually available in a particular market for a specific route to a particular building.

According to New Paradigm Resources Group, CLECs have 36% share of the special access market.

This market share estimate was discredited thoroughly in comments filed in CC Docket No. 96-98 in April 2001.³ The comments in that proceeding showed that NPRG's methodology for estimating competitive LEC special access and private line revenues is completely unreliable. In 1999, the most recent year for which both NPRG and FCC data are available, NPRG estimated competitive LEC special access and private line revenues at \$6.1 billion – more than three times higher than the FCC's figure of \$1.9 billion for that period.⁴

The FCC has recognized that there is enough competition in the special access market to constrain anti-competitive pricing.

This assertion plainly overstates the Commission's decisions. Consequently, even those incumbent LECs that receive pricing flexibility are required to continue to offer special access services under tariff and, in the case of Phase I relief, are subject to price cap regulation to constrain their ability to assess unreasonably high or discriminatory rates. Performance measures and associated reporting requirements together with penalties for non-compliance are intended, in part, to prevent incumbent LECs from achieving similarly anti-competitive results by degrading service quality.

³ See AT&T Reply Comments, CC Dkt No. 96-98, at 17-19 (Apr. 10, 2001); Sprint Reply Comments, CC Dkt No. 96-98, at 4 (Apr. 10, 2001).

⁴ See WorldCom Reply Comments, Attachment, CC Dkt No. 96-98, at 1-2 (Apr. 10, 2001).

FCC has granted special access pricing flexibility in MSAs accounting for 80% of special access revenue. It has granted Phase II relief in MSAs accounting for 2/3 of special access revenue.

These assertions also appear to be intended to confuse pricing flexibility with non-dominance. As the Commission expressly acknowledged in its *Pricing Flexibility* Order, customers in MSAs under Phase II relief may in fact have no alternative to the incumbent LECs on many routes to particular buildings.⁵ Even under Phase II relief, an incumbent LEC may face no competing providers in substantial parts of an MSA. The Commission expressly refused to find that incumbent LECs were non-dominant in the provision of special access service, even where they were eligible for Phase II pricing flexibility.⁶ Recent decisions by state commissions have affirmed that incumbent LECs continue to be dominant in the provision of special access services. In June 2001, for example, the New York Commission issued an order in which it concluded that Verizon “continues to occupy the dominant position in the Special Services market, and by its dominance is a controlling factor in the market.”⁷ Similarly, the California Commission in August 2001 flatly rejected a request by Pacific Bell that its Special Access services be reclassified as “Category III” services, which are considered “fully competitive services.”⁸ The California Commission, among other things, concluded that, “Pacific has not met its burden of proving that it has insignificant market power in each market it intends to serve.”⁹

The FCC’s brief in the appeal of the pricing flexibility order is inconsistent with the adoption of special access performance measures and penalties.

The Commission’s appellate brief carefully and specifically explained the limits of its pricing flexibility decision. The Commission, in particular, stressed that incumbent LECs are required under Phase II to “continue to file generally available tariffs” and remain subject to the statutory requirements of just, reasonable and not unduly discriminatory rates.¹⁰ Simply stated, even under the Phase II regime, “the Commission did not

⁵ See Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Interexchange Carrier Purchases of Switched Access Services Offered by Competitive Local Exchange Carriers; Petition of US West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA, 14 FCC Rcd 14221 (1999), *aff’d*, *WorldCom, Inc. v. FCC*, 238 F.3d 449 (D.C.Cir. 2001) (*Pricing Flexibility Order*) at paras. 142, 155.

⁶ *Pricing Flexibility Order* at para. 151.

⁷ See Opinion and Order Modifying Special Service Guidelines for Verizon New York Inc., Confirming Tariff, and Requiring Additional Performance Reporting, Case Nos. 00-C-2051, 92-C-0665, slip op. at 9 (June 15, 2001).

⁸ In Re Application of Pacific Bell Telephone Company for Authority to Categorize Special Access and ISDN Services as Category III Services, *Order of Dismissal*, slip op. at 2 (Aug. 23, 2001).

⁹ *Id.* at 10.

¹⁰ FCC July 20, 2000 Brief at 27-28.

deregulate the ILECs but retained tariffing and other requirements to restrain abuse of market power.”¹¹

Special access tariffs already contain performance measurements and penalties for missing targets.

SBC does not cite to any specific provision of its interstate access tariff to substantiate this claim. With the exception of SBC’s MVP tariff discussed below, WorldCom is not aware of any performance measures or penalties set forth in SBC’s interstate access tariffs. In particular, WorldCom is not aware of any provision that furnishes an effective remedy to a customer in the event that SBC fails to install an interstate special access circuit by the due date cited in SBC’s firm order confirmation. To the extent that SBC’s tariffs contain terms that purport to be performance measures and penalties, those provisions were added unilaterally by SBC and were not the product of negotiation between parties with similar bargaining power. As a result, the performance measures are inadequate and the penalties insufficient to ensure that SBC provides service in a just, reasonable and non-discriminatory manner. Certainly, any penalties are far less severe than those to which SBC is subject pursuant to merger conditions.

The Indiana Commission recently recognized that these performance measurements and penalties are sufficient.

Ameritech Indiana provides performance data to CLECs for services they purchase. Service credits available when performance parameters are not met. Therefore, the Special Access tariffs address the issue of what remedies exist if Ameritech fails to perform. If the tariffs are insufficient, or if Ameritech fails to perform pursuant to the tariff, the proper course of action is a complaint against Ameritech or a request for an investigation in the appropriate forum. Thus, protections are in existence for CLECs who purchase Special Access service out of Ameritech’s Indiana’s tariff.

IURC, Cause No. 41657, 8/8/01.

The quoted passage does not support SBC’s assertion. Rather, the Indiana Commission’s statement acknowledges that Ameritech’s intrastate tariffs contain remedies in the event its services fall below established quality levels. The cited text also points out that if the remedies are “insufficient” or Ameritech “fails to perform pursuant to the tariff,” a competitive LEC may file a complaint or request that an investigation be initiated. What WorldCom and other competitive LECs are and have been saying is that existing tariffed performance measures and penalties, to the extent they exist at all for interstate special access service, are wholly inadequate. That is why this Commission needs to launch a proceeding to adopt effective performance and reporting requirements as well as forceful remedies.

¹¹ *Id.* at 29.

SBC also has entered into contracts that provide carriers additional protection.

MVP Tariffs:

The performance measures and remedies established in the MVP tariffs were not the product of “negotiation” and, consequently, fall well short of the performance measures and penalties needed to ensure that SBC provides service in a just, reasonable and non-discriminatory manner. Further, MVP tariffs contain provisions that are designed to prevent carriers that enter into those agreements from subscribing to unbundled network elements at cost-based prices. Specifically, SBC’s tariff prohibits MVP customers from obtaining more than five percent of their circuits at unbundled network element prices.¹²

Collaboration with WorldCom in developing Access Performance Measurement plan.

WorldCom has worked with all of its access vendors to develop the existing reports that are provided to WorldCom today. These reports are not based on a comprehensive set of measurements or standards agreed to by the parties, nor are there any agreed-upon Service Level Guarantees (such as the guarantees that are common in competitive telecommunications markets, such as long distance, today) or other financial incentives to encourage improvement and sustained performance at or above the standard. In addition, these reports simply detail SBC’s performance as to WorldCom without any comparative data that shows SBC’s provisioning performance vis-a-vis its own affiliates or business customers. SBC’s reports and the reports of other incumbent LECs are also not standardized, either with respect to the specific measures reported, or with respect to the way in which measures are calculated, thus preventing accurate comparison between incumbent LECs. While the current reporting is valuable to managing the ongoing business relationship between the companies, it does not cover the full range of performance criteria or financial incentives that are necessary to ensure that in a post-271 environment SBC or other BOCs do not backslide in special access performance, and that they do not discriminate in favor of their own retail customers.

Following implementation of the current reporting, special access performance levels increased

This statement is misleading and incorrect. While there have been limited areas of improvement, the trend of SBC performance over the last several years has been negative in many of its own reported metrics. In many areas, SBC performance has continued to decline during this past year. A similar trend has been experienced with other incumbent LECs as well. Even if these levels of performance do increase to acceptable levels in the near term, WorldCom and the FCC must have even greater concern that future performance remains acceptable following BOC 271 entry. At that time, SBC and other BOCs will have added incentive and ability to discriminate against their special access

¹² See, e.g., Ameritech Tariff FCC No. 2, Sec. 19.3(B)(3); 19.3(D).

customers by providing more favorable performance to their long distance retail customers than to competitors who must rely on the BOC for special access services.